



PATENT APPLICATION

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8/14/03  
Date

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Registration No. 20,515

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Art Unit: 3643  
Examiner: David J. Parsley  
Applicant: David G. Sasuga  
Serial No.: 09/919,469  
Filed: July 31, 2001  
For: METHOD FOR PACKAGING EDIBLE PLANTS  
Date: August 14, 2003

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APPEAL BRIEF COVER LETTER

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Sir:

Enclosed herewith is an original and two copies of an Appeal Brief relating to the above-identified application.


Also enclosed is a check for the \$160.00 fee for filing the Brief, set forth in 37 C.F.R. §1.17(c).

Please charge any additional fees associated with consideration of the Brief or credit any overpayment to Deposit Account No. 02-0915. Two duplicate copies of this letter are enclosed.

Respectfully submitted,

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APPEAL BRIEF

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Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

Sir:

This Appeal Brief is submitted in triplicate and is

otherwise in accordance with 37 C.F.R. §1.192 and M.P.E.P. 1206.

#### ORAL HEARING

Appellant does not request an oral hearing under 37 C.F.R. §1.194. Rather, the oral hearing is waived.

#### REAL PARTY IN INTEREST

The "real party in interest" is the applicant/inventor, David G. Sasuga. He is the owner of both the invention and the subject application.

#### RELATED APPEALS AND INTERFERENCES

There are no related appeals and/or interferences.

#### STATUS OF THE CLAIMS

Claims 1-15 are pending in the application. Claims 1, 4, and 13 have been amended. Claims 1 and 3 stand rejected under 35 U.S.C. §102(b) as being anticipated by U.S. Patent No. 4,057,932, granted to Spencer (hereinafter "Spencer 4,057,932"). Claim 2 stands rejected under 35 U.S.C. §103(a) as being unpatentable over Spencer 4,057,932 in view of U.S. Patent No. 5,382,270, granted January 17, 1995 to Neil B. Graham et al. (hereinafter "Graham et al. 5,382,270"). Claims 4-11, 14 and 15 stand rejected under 35 U.S.C. §103(a) as being unpatentable over Spencer 4,057,932 in view of U.S. Patent No. 4,790,105, granted December 13, 1988 to Philip F. Wareing et al. (hereinafter "Wareing et al. 4,790,105"). Claim 12 stands rejected under 35 U.S.C. 103(a) as being unpatentable over Spencer 4,057,932 in

view of Graham et al. 5,382,270 and Wareing et al. 4,790,105. Claim 13 stands rejected under 35 U.S.C. §103(a) as being unpatentable over Spencer 4,057,932 in view of Wareing et al. 4,790,105 and U.S. Patent No. 4,742,644, granted May 10, 1988 to Ernst T. Groth et al. (hereinafter "Groth et al. 4,742,644").

#### STATUS OF AMENDMENTS

As previously mentioned, claims 1, 4, and 13 have been amended. Applicant has not submitted any other amendments that were not entered.

#### SUMMARY OF THE INVENTION

The invention before the Board can best be summarized by reference to the appealed claims, starting with claim 1 which reads:

1. A method of packaging edible seedlings for distribution to and use by consumers, said method comprising:  
providing a tray including a bottom surface having a periphery, said sidewall portions extending upwardly from said periphery and terminating in an upper edge surface; said tray having a predetermined height dimension extending from said bottom surface to said upper edge surface, and said bottom surface and said sidewall portions defining a continuous medium-receiving space;  
growing plants on a growing medium to a seedling stage;  
placing said medium in said space in said tray; and  
distributing said tray, with said medium placed in said tray and said plants growing on said medium, for sale to a consumer while said plants are still in the seedling stage;  
said height dimension being such that a top surface of said growing medium is closely adjacent to said upper edge surface when said medium is placed in said tray to allow easy snipping of said stems without removing said medium from said tray.

As stated in the preamble of claim 1, the present invention is a method of packaging edible seedlings for distribution to and use by consumers. "Culinary herbs" are examples of "edible plants" to which the invention relates. Page 8, line 35.

The invention basically comprises providing a bottom portion or tray 16 that includes a bottom surface having a periphery and sidewall portions which extend upwardly from the periphery and terminate in an upper edge surface (Fig. 1). The tray 16 has a predetermined height dimension extending from the bottom surface to the upper edge surface 11. The bottom surface and the sidewall portions define a continuous medium-receiving space. (Figures 1 and 2).

The invention includes growing edible plant seedlings on a growing medium 8 to a seedling stage. Then, the medium and plant are placed in the tray. The tray is distributed for placing the plants for sale to a consumer while the seedlings are growing in the medium and in the seedling stage. Herein, the "seedling stage" refers to a stage of development of the plants which follows but does not include the sprout stage and at which the stems and leaves of the plant remain soft and edible. See page 2, lines 31-37.

According to the invention, the height dimension of the tray 16 is such that a top surface of the growing medium is closely adjacent to the upper edge surface 11 of the sidewall portions when the medium is in the tray and the plants are in the medium. This height dimension allows for easy snipping of the stems of the plant without removing the medium from the tray. (Figure 5).

According to an aspect of the invention, the tray is a part of a container which is composed of the tray or bottom portion 16 and a top portion 14. See claim 4. Preferably, the top and bottom portions of the container are hingedly connected to each other along a side portion of their interface. The container may

include a latch opposite the hinge connection, for releasably securing the container in a closed position.

In preferred form, the container is vented to allow the plants to have access to fresh air when the plants are in the container and the container is in a closed position.

According to another aspect of the invention, a plurality of the containers are provided. The top portion of one container and the bottom portion of another container are fittable together to facilitate stacking of the containers. See Figure 4, for example.

#### GROUPING OF CLAIMS

Claims 1 and 4 are independent claims. Claims 2 and 3 depend from claim 1. Claims 5-15 depend either directly or indirectly from claim 4. The claims, whether independent or dependent, are independently patentable. That is, the patentability of the dependent claims do not depend solely on the patentability of the independent claim or another dependent claim from which it depends.

#### ISSUES

The issues before the Board are:

- (1) Are claims 1 and 3 anticipated by Spencer 4,057,932?
- (2) Is claim 2 obvious from Spencer 4,057,932 and Graham et al. 5,382,270?
- (3) Are claims 4-11, 14 and 15 obvious from Spencer 4,057,932 and Wareing et al. 4,790,105?
- (4) Is claim 12 obvious from Spencer 4,057,932 and Graham

et al. 5,382,270 and Wareing et al. 4,790,105?

(5) Is claim 13 obvious from Spencer 4,057,932, Wareing et al. 4,790,105 and Groth et al. 4,742,644?

#### THE PRIOR ART

Spencer 4,057,932 relates to reforestation. Specifically it relates to the provision of a container for growing forest seedlings. The container is adapted to promote the growth of a thick root system having relatively straight roots. The container is also adapted for easy removal of the seedling from the container for planting. Fig. 15 shows the seedling 88 and the root ball 90 after they have been removed from the container. Seedlings that are used for reforestation are not eaten by humans and it is common after planting them in the forest to protect them against being eaten by animals. There is no disclosure in this patent of placing the top surface of the growing medium closely adjacent to the upper surface of the container, for any reason.

Graham et al. 5,382,270 relates to control valves in a nutrient solution supply line. A growing medium is placed in a container and selected horticultural plants are grown in the growing medium. The control valve controls the delivery of the nutrient solution into the container and growing medium. Example edible plants are medicinal herbs and culinary herbs. Column 8, lines 15 and 16. There is no disclosure in this patent of any relationship of the top surface of the growing medium to the upper edge surface of the container.

Wareing et al. 4,790,105 discloses a growing tray for



foliage plant seedlings. Column 1, lines 21-27. Fig. 5 shows seedlings 13 within the bottom portion of a container. There is no disclosure in this patent of packaging edible seedlings for distribution to and use by consumers.

Groth et al. 4,742,644 discloses a shipping container for plants 36. The container includes a frame structure 26 defining compartments for receiving a growing medium in which the plant roots are situated (Fig. 2). The frames 12, 14, 16 support the plants in a horizontal position. In one embodiment, a plurality of plant containing trays 12, 14, 16 are stacked together and a cover 18 is placed on the upper frame 16 (Fig. 4). Column 2, lines 54-58. Because of their sideways orientation, the plants disclosed in Groth et al. 4,742,644 do not have a "height dimension." There is no disclosure in the patent of the plants being "edible seedlings."

#### ARGUMENT

It is well established, a claim is not anticipated unless each and every element that it recites is found in a single prior art reference. *In re Paulsen*, 30 F.3d 1475, 31 USPQ2d 167 (Fed. Cir. 1994). Obviousness under 35 U.S.C. §103(a) is a question of "law" but it requires a factual basis in the prior art. *Ex parte Meyer and Tillotson*, 213 USPQ 588 (PO Bd App. 1982). The prior art must show all of the elements that are claimed and must include evidence making it obvious to select some features from the prior art, reject the remaining features, and then combine the selected features in the manner that is claimed.

#### CLAIM 1

Claim is not anticipated by Spencer 4,057,932 because Spencer does not relate to a "method of packaging edible seedlings for distribution to and use by consumers." Rather, Spencer 4,057,932 relates to "reforestation" and the packaging of small trees in such a manner that they can be easily removed from the package and placed into the ground. Spencer 4,057,932 does not disclose "growing plants on a growing medium to a seedling stage" and then "placing said medium in said space in said tray." Spencer 4,057,932 does not disclose "distributing said tray, with said medium placed in said tray and said plants growing on said medium, for sale to a consumer while said plants are still in the seedling stage." Spencer 4,057,932 does not disclose "a predetermined height dimension extending from said bottom surface to said upper edge surface" or "said height dimension being such that a top surface of said growing medium is closely adjacent to said upper edge surface when said medium is placed in said tray to allow easy snipping of said stems without removing said medium from said tray." Claim 1 is not anticipated because Spencer 4,057,932 does not disclose each and every element that is recited by claim 1. It is submitted that claim 1 is allowable and its allowance is requested.

#### CLAIM 2

Claim 2 depends from claim 1 and is thus patentable for the same reason as claim 1. Claim 2 specifies that the "plants are culinary herbs." It is true that Graham et al. 5,382,270 discloses growing culinary herbs but it does not supply any of

the deficiencies of Spencer 4,057,932, discussed above. Claim 2 does not merely call for culinary herbs but calls for a relationship of the top surface of the growing medium to the upper edge surface of the container. It is submitted that claim 2 is not obvious from Spencer 4,057,932 and Graham et al. 5,382,270 because neither reference discloses the deficiencies of the other or provides any suggestion of combining the teachings of the two references in such a way that the terms of claim 2 are met. The invention of claim 2, considered as a whole, is not obvious from Spencer 4,057,932 in combination with Graham et al. 5,382,270.

#### CLAIM 3

Claim 3 has been rejected as being anticipated by Spencer 4,057,932. Claim 3 is not anticipated by Spencer 4,057,932 for the reasons stated above in connection with claim 1. Spencer teaches growing the plants in a greenhouse for at least eight weeks after seedling. However, as previously stated, Spencer 4,057,932 is not concerned with growing "edible seedlings." Rather, it is concerned with growing seedlings that are used for reforestation, not for eating by humans.

#### CLAIM 4

Claim 4 is not obvious from Spencer 4,057,932 in combination with Wareing et al. 4,790,105. As previously stated, Spencer 4,057,932 does not disclose a method of packaging "edible seedlings for distribution to and use by consumers." Rather, Spencer 4,057,932 grows seedlings that are used for

reforestation. He provides a container that is adapted for easy removal of the seedling from the container for planting. There is no disclosure in Spencer 4,057,932 of placing the top surface of the growing medium closely adjacent to the upper surface of the container. It does not disclose "growing plants on a growing medium to a seedling stage" and then "placing said medium in [the] bottom portion of the container" and then "closing said container, with said medium in said bottom portion, into [a] closed position." It is submitted that claim 4 is not obvious from Spencer 4,057,932 in combination with Wareing et al. 4,790,105.

#### CLAIM 5

Claim 5 depends from claim 4 and states that the top and bottom portions of the container are "hingedly connected to each other along a side portion of said interface." This feature is not disclosed by Wareing et al. 4,790,105. Rather, Wareing et al. 4,790,105 discloses a "snap on" top portion or lid 10. Quite clearly, Wareing et al. 4,790,105 does not disclose the several deficiencies of Spencer 4,057,932.

#### CLAIM 6

Claim 6 depends from claim 5 and specifies a "latch" in combination with the hinge connection. This combination of features is not disclosed by Wareing et al. 4,790,105. Also, Wareing et al. 4,790,105 does not disclose the other deficiencies of Spencer 4,057,932.

#### CLAIM 7

Claim 7 depends from claim 4 and adds the "latch." Quite clearly, Spencer 4,057,932 and Wareing et al. 4,790,105 do not disclose the combination of claim 7 when the claim is considered "as a whole."

#### CLAIM 8

Claim 8 depends from claim 4 and specifies "providing said container with venting to allow said plants to have access to fresh air when said plants are in said container and said container is in said closed position." The plants in question are "edible seedlings." There is no disclosure in Wareing et al. 4,790,105 of packaging edible seedlings for distribution to and use by consumers and providing the packaging with venting. As previously mentioned, Spencer 4,057,932 relates to packaging seedlings for purposes of reforestation. There is no disclosure in this patent of growing seedlings that are to be eaten by humans.

#### CLAIM 9

Claim 9 depends from claim 8 and specifies that the step of providing the container for venting "comprises leaving at least one gap between said top portion and said bottom portion when said container is in said closed position." The Examiner states that this feature is disclosed by Fig. 10 of Spencer 4,057,932. Applicant respectfully disagrees. Spencer 4,057,932 does not disclose a top portion for his container. He only discloses a bottom portion. Accordingly, he does not disclose "at least one

gap between said top portion and said bottom portion when said container is in said closed position."

#### CLAIM 10

Claim 10 depends from claim 4 and specifies that the container has "an open position in which, when said medium is in said bottom portion with said plants in the seedling stage extending upwardly from said medium, said plants are easily accessible to a user to allow stem portions of said plants to be snipped." This feature is shown by Fig. 5. It is not shown by the references. Spencer 4,057,932 does not disclose a container having a bottom portion and a top portion, etc. It does not disclose "edible seedlings" positioned to where the stem portions of the seedlings can be easily snipped. Claim 10 is not obvious from the hypothetical combination of Spencer 4,057,932 and Wareing et al. 4,790,105.

#### CLAIM 11

Claim 11 depends from claim 5 and adds to claim 5 the feature of claim 10. Claim 11 is not obvious from Spencer 4,057,932 and Wareing et al. 4,790,105 for the reasons discussed above and further for the reason that they do not disclose a top portion and a bottom portion that are hingedly connected to each other along a side portion of the container.

#### CLAIM 12

Claim 12 depends from claim 4 and specifies that the plants are "culinary herbs." Although it is known per se to grow culinary herbs, claim 12 specifies that the herbs are first grown on a growing medium to a seedling stage and then the medium and the seedling stage edible plants are placed in the bottom portion of the container. The claim also specifies that the container is closed and is distributed for sale to a consumer while the plants are still in the seedling stage. Considered "as a whole", claim 12 is not obvious from the reference patents.

#### CLAIM 13

Claim 13 depends from claim 4 and specifies providing a plurality of containers. It also specifies providing the top walls of the top portions of the containers and the bottom walls of the bottom portions of the containers with "complementary portions to facilitate stacking of the containers and inhibit accidental tipping of the stack of the containers." This "stack" is a stack of containers that have both a bottom portion and a top portion. Groth et al. 4,742,644 shows a stack arrangement of frames. Only the top frame has a top portion and it does not have the height dimension that is specified in claim 4. Quite clearly, the features of claim 13 are not all shown by Spencer 4,057,932, Wareing et al. 4,790,105 and Groth et al. 4,742,644. The references do not include a proper factual basis to support an obviousness rejection under 35 U.S.C. §103(a).

#### CLAIM 14

Claim 14 depends from claim 4 and specifies that the medium is placed in the bottom portion after the plants have been grown to the seedling stage. Again, these are "edible seedlings." Quite clearly, neither of the reference patents discloses growing the plants to a seedling stage in a medium and then placing the medium in the bottom portion of a container that includes a top portion.

#### CLAIM 15

Claim 15 depends from claim 4 and specifies "growing said plants from seed for at least about four weeks." The seeds are the seeds of an edible plant. The seeds are grown to the seedling stage before the medium and the plants are placed in the bottom portion of the container. Claim 15, considered "as a whole", is not obvious from Spencer 4,057,932 in view of Wareing et al. 4,790,105.

#### RESPONSE TO THE EXAMINER'S ARGUMENTS

Regarding Spencer 4,057,932, the Examiner states that even though Spencer 4,057,932 discloses growing seedlings to be used for reforestation, the seedlings are "edible to herbivores such as deer and thus it is inherent that the seedlings are edible." Firstly, this statement is conjecture. Secondly, claim 1 specifies "distributing said tray, with said medium placed in said tray and said plants growing on said medium, for sale to a consumer while said plants are in the seedling stage." This step is not disclosed by Spencer 4,057,932. Spencer 4,057,932 also



does not disclose "a height dimension that places a top surface of the growing medium closely adjacent to the upper edge surface of the tray, so that when the medium is placed in the tray, it will be easy to cut the stems without removing the medium from the tray." These features are not disclosed by the reference. Spencer 4,057,932 discloses a "bottom portion" that is composed of two side parts. When the side parts are brought together, they form the bottom portion. This bottom portion provides a receptacle for receiving a single plant. Contrary to the Examiner's argument, it does not disclose placing multiple plants in one continuous medium receiving space.

Referring to the first paragraph on page 9 of the final rejection, Spencer 4,057,932 does not disclose the distribution and sale of edible seedlings to a consumer while the plants are still in the seedling stage. The seedlings disclosed by Spencer 4,057,932 are not inherently edible by the consumer.

The Examiner points out that Spencer 4,057,932 discloses a growing period that is typically about four weeks or longer. This does not establish that the stage of development is such that the stems and the leaves of the plants remain soft. The plants in question are plants that are edible by a consumer.

Regarding the Examiner's argument set forth in the third paragraph on page 9, there is no teaching or motivation of providing the open top container of Spencer 4,057,932 with a top portion. The mere fact that Wareing et al. 4,790,105 has a top portion does not make it obvious to provide the open top container of Spencer 4,057,932 with a top portion having a top wall.

In the paragraph starting at the bottom of page 9 and continuing over onto the top of page 10, the Examiner argues that Spencer 4,057,932 discloses packaging edible seedlings for distribution to and use by consumers and distributing the containers for sale to a consumer while the plants are still in the seedling stage. It is submitted that the claim language "edible seedlings" means more than the seedlings are edible by animals. The claim specifies that the seedlings are for consumers and thus "edible" means that they are edible by the consumers, not by animals.

On page 10 of the Office Action, the Examiner presents an argument regarding claim 5. In this argument the Examiner is treating the two side sections of the open top container as if one was a bottom portion and the other a top portion. This is an incorrect reading of the reference.

Regarding the Examiner's argument concerning claims 6 and 7, the claims specify a hinge on one side of the container and a latch on the opposite side. This combination is not disclosed by the references.

Regarding the Examiner's argument directed to claims 8 and 9, Spencer 4,057,932 discloses two side portions connected together to form an open top container. It does not disclose a container composed of both a top portion and a bottom portion such as claimed. Quite clearly, the references do not show or make obvious the inventions that are claimed by claims 8 and 9.

On page 11 of the Office Action, the Examiner argues with respect to claims 10 and 11 that Spencer 4,057,932 allows one to manipulate the seeding in any way. The Examiner argues that the

plant can be snipped and still be in a condition for transplanting. However, this is not what is claimed. Claims 10 and 11 set forth a combination of steps and it is this combination that is neither disclosed by nor obvious from the references.

On page 11 of the Office Action, the Examiner argues that the motivation to combine the methods disclosed by Spencer 4,057,932; Wareing et al. 4,790,105 and Graham et al. 5,382,270 is that Spencer 4,057,932 and Graham et al. 5,382,270 both disclose containers for growing plants. It is stated that it would be obvious to combine Spencer 4,057,932, as modified by Wareing et al. 4,790,105, with Graham et al. 5,382,270. It is submitted that the Examiner has not by his statements presented any evidence of "motivation." The rejection is a hindsight rejection based on appellant's disclosure.

With respect to claim 13, the Examiner argues that Groth et al. 4,742,644 shows a top wall 18 and a bottom wall 82 that meets the limitations of amended claim 13. However, the Examiner has not shown any evidence as to why it would be obvious to a person of ordinary skill in the art to combine the references in the manner required to meet the terms of the entire claim.

The Examiner next argues that there is motivation for combining Spencer 4,057,932 and Wareing et al. 4,790,105 but does not identify the motivation. It is submitted that there is no motivation. Rather, the Examiner's rejection is a hindsight rejection, based on the claim language, and it does not take into account all of the claim language.

CONCLUSION

For the reasons set forth above, it is submitted that claims 1-15 are all patentable over the reference patents that have been applied by the Examiner. The Board is asked to reverse the Examiner and allow all of the claims.

Respectfully submitted,

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## APPENDIX

1. A method of packaging edible seedlings for distribution to and use by consumers, said method comprising:

5 providing a tray including a bottom surface having a periphery, said sidewall portions extending upwardly from said periphery and terminating in an upper edge surface; said tray having a predetermined height dimension extending from said bottom surface to said upper edge surface, and said bottom surface and said sidewall portions defining a continuous medium-receiving space;

10 growing plants on a growing medium to a seedling stage; placing said medium in said space in said tray; and distributing said tray, with said medium placed in said tray and said plants growing on said medium, for sale to a consumer while said plants are still in the seedling stage;

15 said height dimension being such that a top surface of said growing medium is closely adjacent to said upper edge surface when said medium is placed in said tray to allow easy snipping of said stems without removing said medium from said tray.

2. The method of claim 1, wherein said plants are culinary herbs.

3. The method of claim 1, wherein growing said plants to said seedling stage comprises growing said plants from seed for at least about four weeks.

4. A method of packaging edible seedlings for distribution

to and use by consumers, said method comprising:

providing a container including a top portion and a bottom portion, said container having a closed position in which said top portion and said bottom portion meet at an interface;

5 growing plants on a growing medium to a seedling stage;

placing said medium in said bottom portion of said container;

closing said container, with said medium in said bottom portion, into said closed position; and

10 distributing the closed container for sale to a consumer while said plants are still in the seedling stage;

said bottom portion having a height dimension such that a top surface of said growing medium is closely adjacent to said interface when said medium is placed in said bottom portion, and  
15 said top portion having a top wall and a height dimension such that, when said container is in said closed position and said medium is in said bottom portion with said plants in the seedling stage extending upwardly therefrom, said plants are freely received in and protected by said top portion.

5. The method of claim 4, wherein said top portion and said bottom portion are hingedly connected to each other along a side portion of said interface.

6. The method of claim 5, wherein said container includes a latch opposite said side portion of said interface to releasably secure said container in said closed position, and closing said container includes engaging said latch.

7. The method of claim 4, wherein said container includes a latch to releasably secure said container in said closed position, and closing said container includes engaging said latch.

8. The method of claim 4, comprising providing said container with venting to allow said plants to have access to fresh air when said plants are in said container and said container is in said closed position.

9. The method of claim 8, wherein providing said container with venting comprises leaving at least one gap between said top portion and said bottom portion when said container is in said closed position.

10. The method of claim 4, wherein said container has an open position in which, when said medium is in said bottom portion with said plants in the seedling stage extending upwardly from said medium, said plants are easily accessible to a user to  
5 allow stem portions of said plants to be snipped.

11. The method of claim 5, wherein said container has an open position in which, when said medium is in said bottom portion with said plants in the seedling stage extending upwardly from said medium, said plants are easily accessible to a user to  
5 allow stem portions of said plants to be snipped.

12. The method of claim 4, wherein said plants are culinary

herbs.

13. The method of claim 4, comprising providing a plurality of said containers, and providing said top wall of said top portion and a bottom wall of said bottom portion of each container with complementary portions to facilitate stacking of the containers and inhibit accidental tipping of a stack of the containers.

14. The method of claim 4, wherein said medium is placed in said bottom portion after said plants have been grown to the seedling stage.

15. The method of claim 4, wherein growing said plants to said seedling stage comprises growing said plants from seed for at least about four weeks.